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1                   UNITED STATES DISTRICT COURT  
2                   EASTERN DISTRICT OF NEW YORK

3                   ----- X  
4           UNITED STATES OF AMERICA, : 08-CR-640  
5   v. : U.S. Courthouse  
6   : Brooklyn, New York  
7           ROBERT SIMELS :  
8           ARIENNE IRVING : Defendants. : August 13, 2009  
9   : 9:30 o'clock a.m.  
10                  ----- X

11                   TRANSCRIPT OF TRIAL  
12                   BEFORE THE HONORABLE JOHN GLEESON  
13                   UNITED STATES DISTRICT JUDGE, and a jury.

14                   APPEARANCES:

15           For the Government:           BENTON J. CAMPBELL  
16   United States Attorney  
17   BY: STEVEN L. D'ALESSANDRO  
18   MORRIS FODEMAN  
19   DANIEL BROWNELL  
20   Assistant U.S. Attorneys

21           For the Defendants:           GERALD SHARGEL, ESQ.  
22   EVAN L. LIPTON, ESQ.  
23   For Robert Simels

24   JAVIER A. SOLANO, ESQ.  
25   LAWRENCE BERG, ESQ.  
   For Arienne Irving

26           Court Reporter:              Gene Rudolph  
27   225 Cadman Plaza East  
28   Brooklyn, New York 11201  
29   (718) 613-2538

30   Proceedings recorded by mechanical stenography, transcript  
31   produced by CAT.

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1                   (The following occurred in the absence of the jury  
2 at 9:30 am.)

3                   THE COURT: Good morning, everyone.

4                   Please be seated.

5                   Ilene, do we know if all the jurors are here?

6                   THE CLERK: Yes, Your Honor.

7                   They have started.

8                   THE COURT: Okay. Let me recap, restate, how I  
9 intend to answer these questions in jury note -- what number  
10 was that?

11                  THE CLERK: Fifteen, Judge.

12                  THE COURT: Fifteen.

13                  As to the first one, I will tell them -- I've  
14 basically just roughed out by typing it what we spoke about  
15 yesterday evening.

16                  In answer to the first question, I am going to say  
17 yes.

18                  For example, it's reasonable to pay an investigator  
19 to gather information about potential witnesses. It's also  
20 reasonable to pay others who are not investigators who have  
21 knowledge relevant to the defense for their information. But  
22 in both instances, it is legal to pay for the information only  
23 if the payment is not made for or because of the testimony a  
24 person will give at trial.

25                  Put another way, and I assume from your question

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1 that it arises in connection with Count Ten, the government  
2 must proof beyond a reasonable doubt that the defendant you  
3 are considering indirectly offered or promised money to Leslyn  
4 Camacho for or because of testimony to be given by Ms. Camacho  
5 in the narcotics trial of Roger Khan. As I said, I assume  
6 your question relates to the elements of Count Ten and not  
7 also to -- I will just say, and not to other counts. If I am  
8 wrong about that you should let me know.

9                  Does anybody want to be heard on that?

10                MR. D'ALESSANDRO: No, Your Honor.

11                MR. SOLANO: No, Your Honor.

12                MR. SHARGEL: My hesitation -- my hesitation is,  
13 again, the mere offer, that speaking the words by itself,  
14 essentially you are not going over the elements again and my  
15 problem is that by just saying the offer, it -- one might  
16 infer that the naked words are sufficient to violate the  
17 statute.

18                THE COURT: Why don't I just tell them that I don't  
19 mean here to be reinstructing them about all the elements of  
20 Count Ten.

21                MR. SHARGEL: There are other elements?

22                THE COURT: There are other elements and they have  
23 them in the charge. All right?

24                MR. SHARGEL: Yes.

25                THE COURT: All right. Second, you asked what a

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1 reasonable amount of money would be when someone pays for  
2 information. Although you can certainly consider any amount  
3 you find was paid or offered in determining the purpose for  
4 which it was offered, as long as the purpose is not an illegal  
5 one, the amount paid doesn't really matter. The law imposes  
6 no limit on the amount to be paid for information. It  
7 imposes -- sorry -- I am violating my own rule. I am reading  
8 too fast. Sorry. It imposes a strict limit on the purposes  
9 for which payments or offers of payments may be made.

10 MR. D'ALESSANDRO: No objection.

11 MR. SOLANO: No objection.

12 MR. SHARGEL: What about the -- the indisputable  
13 fact, I think this applies to both sides, that a witness can  
14 be paid for expenses, basic expenses, such as parking and lost  
15 wages. I think that's right in the disciplinary rules. To  
16 say that someone could never be paid in connection with  
17 appearance or testimony may be misleading as a matter of law.

18 THE COURT: I didn't just say it there.

19 MR. SHARGEL: Sorry?

20 THE COURT: I didn't mention anything right there  
21 about being paid for testimony.

22 MR. SHARGEL: May I hear it once more?

23 THE COURT: You asked what a reasonable amount of  
24 money would be when someone pays for information. Although  
25 you can certainly consider any amount you find was paid or

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1 offered in determining the purpose for which it was offered,  
2 as long as the purpose is not the illegal one, the amount paid  
3 doesn't really matter. The law imposes no limit on the amount  
4 to be paid for information. It imposes a strict limit on the  
5 purposes for which payments or offers of payments may be made.

6 MR. SHARGEL: Do you think that the -- the last  
7 sentence is -- leaves the lingering question of whether  
8 someone can be paid for -- for attendant expenses in  
9 connection with appearance to testify? Just the last  
10 sentence? The strict limit on paying someone in connection  
11 with testimony?

12 THE COURT: Why don't I just leave that last  
13 sentence out?

14 MR. SHARGEL: That's what I was thinking.

15 THE COURT: As long as -- I will finish it with, as  
16 long as the purpose is not the illegal one described above,  
17 the amount paid doesn't really matter.

18 MR. D'ALESSANDRO: No objection.

19 MR. SHARGEL: That's fine.

20 THE COURT: All right. Are you all right with that,  
21 Mr. Solano?

22 MR. SOLANO: Yes, Your Honor.

23 THE COURT: You ask about the difference between the  
24 information from an expert witness and the information from a  
25 non-expert witness. I assume since your question mentions

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1       witnesses that you are asking about the differences between  
2       expert testimony and non-expert testimony. I will tell you  
3       the answer to that in a moment.

4               I suspect it is possible, since you ask about  
5       information, you are asking about the difference between  
6       information obtained through expert or licensed investigators  
7       and information obtained from others who are not  
8       investigators. If that's not what you meant, say so. But I  
9       will answer the question as I think you meant it.

10              Expert witnesses testify not to facts, which is what  
11      all other witnesses testify about, but to opinions. Their  
12      testimony is intended to help you decide the facts of the  
13      case.

14              Here, I allowed expert testimony to assist you in  
15      determining whether Simels's conduct amounted to the kind of  
16      lawful, bona fide legal representation that is not prohibited  
17      by the witness tampering statute.

18              Expert testimony is the same as non-expert testimony  
19      in that, at all events, the determination of the facts of the  
20      case is for you. If you find the expert's opinion useful in  
21      your own independent determinations of fact you may consider  
22      it. Like the testimony of any other witness, you will give  
23      the expert testimony whatever weight, if any, you feel it  
24      deserves.

25              MR. SHARGEL: Judge, I hope I am not picking nits.

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1 But when you -- when you addressed the potential question, the  
2 question about whether it is a licensed investigator or not,  
3 you really have answered that question. In other words,  
4 instead of inviting another note, the question has been  
5 answered when you addressed it in -- in response to the first  
6 question, where you say that it's -- you can pay any person  
7 with knowledge.

8 THE COURT: I only put this in there because of you.

9 MR. SHARGEL: I understand.

10 THE COURT: Do you want me to take it out?

11 MR. SHARGEL: No. I was just suggesting, if that's  
12 your question, I've already answered it, you would say, I  
13 respectfully submit. I've already answered it because you can  
14 pay -- there is no distinction between paying for information  
15 from a licensed investigator or just a person with knowledge.

16 THE COURT: Let me just take it out then. If that  
17 was their question, they will realize I just answered it.

18 MR. SHARGEL: Very well.

19 THE COURT: All right. That shortens that a bit.

20 Lastly, you asked what would represent a character  
21 witness against David Clarke. If you assume that Clarke's  
22 testimony or statements were offered against Roger Khan at  
23 trial, a character witness would be someone who would testify  
24 to Clarke's reputation for truthfulness; that is, whether he  
25 has a reputation in his community for being believable.

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1           Also, in this setting such a witness might be  
2 someone who would testify to the effect that Clarke had a bias  
3 against the defendant.

4           Any objection?

5           MR. D'ALESSANDRO: No.

6           MR. SHARGEL: Bias or motive?

7           THE COURT: Denied.

8           MR. SHARGEL: That --

9           THE COURT: Denied. You are picking nits again.

10          MR. SHARGEL: All right. I think I am.

11          MR. SOLANO: No objection.

12          THE COURT: Bring in the jury, please.

13          Sorry?

14          MR. SOLANO: No objection.

15          THE COURT: All right.

16          MR. SOLANO: Your Honor, I don't know if you decided  
17 not to answer the second question about the example. I am not  
18 sure if you said you were going to answer that yesterday.

19          THE COURT: Not on a case specific basis. That was  
20 actually -- that was withdrawn I think.

21          MR. SHARGEL: Yes.

22          THE COURT: Generically I am giving them examples of  
23 an investigator and non-investigator. All right?

24          MR. SHARGEL: Yes.

25          THE COURT: Anything further?

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1 MR. D'ALESSANDRO: No, Your Honor.

2 THE COURT: Okay. Bring in the jury, please.

3 I looked at the questionnaires. I am pretty sure,  
4 because I think the problems with people coming next week,  
5 were not being able to come in after the 16th. I think those  
6 were written on the back, in the hardship part. I don't think  
7 any of our jurors is one of the people who had a problem with  
8 next week.

9 I am going to tell them we are not sitting tomorrow  
10 and that's it. I will tell them we are not sitting tomorrow.

11 (Jury present.)

12 THE COURT: Good morning.

13 Nice to see you.

14 Have a seat.

15 Before we broke for the day yesterday you sent us  
16 note 15 with a list of questions that I am going to answer for  
17 you now.

18 One was, are there instances where it is legal to  
19 pay for information?

20 The answer to that is yes.

21 Your follow up question is, if it is yes, are there  
22 examples that may be pertinent to this case?

23 Yes, there are. For example, it is reasonable to  
24 pay an investigator to gather information about potential  
25 witnesses. It is also reasonable to pay others who are not

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1 investigators who have knowledge relevant to the defense of a  
2 case for their information. But in both instances it is legal  
3 to pay for the information only if the payments or payment is  
4 not made for or because of the testimony a person will give at  
5 trial.

6 Put another way, and I assume from your question  
7 that it arises in connection with Count Ten, the government  
8 must prove beyond a reasonable doubt that the defendant you  
9 are considering indirectly offered or promised money to Leslyn  
10 Camacho for or because of the testimony to be given by  
11 Ms. Camacho in the narcotics trial of Roger Khan.

12 As I have said, I assume your question relates to  
13 the elements of Count Ten and not to other counts. If I am  
14 wrong about that, you ought to let me know in a follow-up  
15 note.

16 Also, I don't mean by answering your specific  
17 question to in any way have you lose sight of the fact that  
18 there are elements, there are multiple elements, which must be  
19 proved beyond a reasonable doubt before you can find a  
20 defendant guilty of Count Ten. You have those instructions.  
21 You have them in the jury room. I am focusing on this aspect  
22 of those instructions. I don't want you to lose sight of the  
23 elements. There are other elements the government must prove.

24 Your second follow-up question is, if yes, if there  
25 are instances in where it is legal to pay for information,

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1 what is a reasonable amount to pay?

2 Now, although you can certainly consider any amount  
3 you find was paid or offered in determining the purpose for  
4 which it was offered, as long as the purpose is not the  
5 illegal one that I just described a moment ago, the amount  
6 paid doesn't really matter.

7 You ask about the difference between the information  
8 from an expert witness and the information from a non-expert  
9 witness. I assume since your question mentions witnesses that  
10 you are asking about the difference or differences between  
11 expert testimony and non-expert testimony.

12 Again, if I am wrong about this or in my  
13 understanding of any of your questions, you just tell me in a  
14 follow-up note.

15 Expert witnesses testify not to facts, which is what  
16 all other witnesses testify about, but to opinions. Their  
17 testimony is intended to help you decide the facts of the  
18 case.

19 Here, I allowed expert testimony to assist you in  
20 determining whether Simels's conduct amounted to the kind of  
21 lawful, bona fide legal representation that is not prohibited  
22 by the witness tampering statute.

23 Expert testimony is the same as non-expert testimony  
24 in that, at all events, the determination of the facts of the  
25 case is for you. If you find the expert's opinion useful in

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1 your own independent determinations of fact, you may consider  
2 it. Like the testimony of any other witness, you will give  
3 the expert testimony whatever weight, if any, you feel it  
4 deserves.

5           Lastly, you asked what would represent a character  
6 witness against David Clarke. If you assume that Clarke's  
7 testimony, or statements, were offered say against Roger Khan  
8 at a trial, a character witness would be someone who would  
9 testify to Clarke's reputation for truthfulness. That is,  
10 whether he has a reputation in his community for being  
11 believable.

12           Also, in that setting, such a witness might be  
13 someone who would testify to the effect that Clarke had a bias  
14 against Khan.

15           All right. That's what a character witness would  
16 be.

17           I think I have answered your questions. If I  
18 haven't done so sufficiently, you've already demonstrated that  
19 you have the ability to let me know, and I trust you will.

20           Okay. Please return to the jury room and resume  
21 your deliberations.

22           (Recess taken.)

23           (Continued on next page.)

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1                   (The following occurred in the absence of the jury  
2 at 11:30 am.)

3                   THE COURT: As you know, jury notes 16, 17 and 18  
4 seek the testimony of Mr. Simels.

5                   The first with regard to the alleged bribe of  
6 Camacho, direct and cross. That's 16.

7                   17, direct and cross regarding Farrah Singh.

8                   18, direct and cross regarding Alicia Jagnarain.

9                   (So marked.)

10                  I know I asked you through Ilene to put your heads  
11 together and send stuff in. But I don't know about you but I  
12 see a pattern developing here. It makes me wonder whether we  
13 shouldn't just send in the testimony and tell them if they  
14 want to us digest it, we could do that.

15                  I see some virtue in -- if I were in your shoes, I  
16 guess I see some virtue in seeing where they are and where  
17 they are headed. But that thought had occurred to me.

18                  I thought I'd get your comments on it.

19                  MR. FODEMAN: However Your Honor wants to proceed.

20                  MR. SHARGEL: I would ask that the whole thing go  
21 back. It's obvious what they are doing.

22                  THE COURT: It's kind of silly to do it in pieces  
23 like this.

24                  MR. SHARGEL: Yes.

25                  THE COURT: Do you agree, Mr. Solano?

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1 MR. SOLANO: Absolutely.

2 THE COURT: All right. Could you do your Post-it  
3 thing with the Simels testimony?

4 MR. FODEMAN: From beginning to end?

5 THE COURT: Beginning to end, yes.

6 I think I will -- I think I will bring them back in  
7 once that is ready. Would you like me to offer to them that  
8 we will provide a digest or wait and just say to them if they  
9 need a digest they can ask for it?

10 MR. SHARGEL: I would prefer that you not say  
11 anything until they ask for it.

12 MR. FODEMAN: Fine.

13 THE COURT: All right. We already sent in -- I  
14 didn't realize that.

15 THE CLERK: Yes, Your Honor.

16 THE COURT: Court Exhibit 8 was Camacho --

17 MR. SHARGEL: Not 8, Judge, 16.

18 THE COURT: Court Exhibit?

19 THE CLERK: Court Exhibit, the transcript itself.

20 THE COURT: We've already complied with note 16 in  
21 Court Exhibit 8; with note 17 in Court Exhibit 9.

22 (So marked.)

23 How about I do this? If you give me that, I will  
24 take care of copying it. On the way out now, I will poke my  
25 head in the jury room and say in response to note 18, we are

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1 going to make a copy of the entire transcript of Robert  
2 Simels's testimony and send it in. When it is ready we will  
3 send it in.

4 MR. SHARGEL: That's fine.

5 THE COURT: Fair enough?

6 MR. SOLANO: Yes, Your Honor.

7 MR. FODEMAN: Yes.

8 THE COURT: Okay.

9 MR. SHARGEL: Are you going to report back if they  
10 say anything?

11 THE COURT: I'll. If I get any information, I will  
12 impart it to you.

13 MR. SHARGEL: Thank you.

14 THE COURT: All right.

15 (Recess taken.)

16 (Continued on next page.)

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1                   (The following occurred in the absence of the jury  
2 at 2:25 pm.)

3                   THE COURT: All right. In the case on trial, there  
4 are a couple old notes to be placed on the record.

5                   19 was: Please supply Ms. Irving's memos and  
6 meeting minutes.

7                   20 is: Request a break at 1:40, which they got.  
8 It's now 2:27.

9                   Jury note 21, requesting all emails to and from  
10 Ms. Irving.

11                  (All so marked.)

12                  Please put your heads together on that. Once you  
13 have them collected and you agree on it, Mr. Solano, with the  
14 prosecutor, you can send them in. If there is any  
15 disagreement, please let me know.

16                  (Recess taken.)

17                  (Continued on next page.)

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1                   (The following occurred in the absence of the jury  
2 at 3:05 pm.)

3                   THE COURT: All right. The case on trial, jury note  
4 22: Request transcripts between Simels and Vaughn regarding  
5 Farrah Singh.

6                   I did get a bit of information when I dropped off  
7 the -- when I went in there and told them I was going to give  
8 them the entirety of Mr. Simels's testimony.

9                   Where is Mr. Simels?

10                  MR. SHARGEL: Sorry. I hadn't noticed that myself.

11                  (Mr. Simels now present.)

12                  THE COURT: I was saying, that -- Mr. Simels has  
13 joined us.

14                  I was saying that when I dropped off the  
15 transcript -- when I told them, rather, that I would be  
16 dropping off the entire transcripts of Mr. Simels's testimony,  
17 they said oh, to the effect, oh, great. Thank you. We didn't  
18 know we could ask for that.

19                  I think what happened is, they took too much to  
20 heart my admonition to them to be as specific as they can when  
21 they are asking for a readback request. I think they got the  
22 misimpression they couldn't ask for the whole thing.

23                  As I mentioned, note 22 requests transcripts between  
24 Simels and Vaughn regarding Farrah Singh.

25                  So you know the drill. This is like the 15th of

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1 these.

2 Please put your heads together and try to see if you  
3 can agree on what ought to go in. If you can't agree, I will  
4 come down.

5 (Recess taken.)

6 (Continued on next page.)

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1                   (The following occurred in the absence of the jury  
2 at 4:50 pm.)

3                   THE COURT: It's ten to five. I think I will send  
4 in this note, unless anyone successfully objects.

5                   It says: Ladies and gentlemen, would you like to  
6 stay and deliberate some more or adjourn for the day? Please  
7 let us know.

8                   Any objection?

9                   MR. SHARGEL: No objection.

10                  MR. SOLANO: No objection.

11                  MR. D'ALESSANDRO: No objection.

12                  THE COURT: This is going to be Court Exhibit 11.

13                  THE CLERK: Yes, Your Honor.

14                  (So marked.)

15                  (Pause.)

16                  THE COURT: Court Exhibit 11 has produced jury note  
17 23, which says: We would like to resume on Monday.

18                  (So marked. )

19                  THE COURT: I am going to go in, give them my normal  
20 pitch, excusing them for the day, telling them not to discuss  
21 the case. We will resume at 9:30 Monday. Stay off the  
22 computers and the like.

23                  Fair enough?

24                  MR. SHARGEL: You want us to stay off the computers?

25                  THE COURT: No. You can go on the computers. But I

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1 will tell them to stay off.

2 Stick around in the courtroom for a few minutes,  
3 please. Give them a chance to get out.

4 Good night. Have a nice weekend.

5 (Recess taken until August 17, 2009, at 9:30 am.)

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3                   E X H I B I T S:  
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5	jury notes 16, 17 and 18	2039
6	Court Exhibit 8	2040
7	Court Exhibit 9	2040
8	19	2042
9	20	2042
10	21	2042
11	22	2043
12	Court Exhibit 11	2045
13	jury note 23	2045
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